No. 93-875

In The

Supreme Court of the United States

October Term, 1993

MACEO G. WILLIS, JR.,

Cross-Petitioner,

v.

CITY OF CHICAGO

Cross-Respondent.

On Cross-Petition For Writ Of Certiorari
To The United States Court of Appeals
For The Seventh Circuit

CROSS-PETITIONER'S REPLY MEMORANDUM

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INTRODUCTION

In its Brief in Opposition to Cross-Petitioner's Petition for Certiorari (the "Opposition Brief" or "Opp. Br."), the City again concedes that this case is of "great significance" and "considerable importance" to society. Opp. Br., pp. 3-4. It argues, however, that because much of the benefit derived from the Seventh Circuit's decision inures to individuals other than Cross-Petitioner, he is not entitled to an award of attorney's fees under 42 U.S.C. §1988. Opp. Br., pp. 3-5. The City also argues that the court-appointed status of Willis' counsel is irrelevant to the attorney's fees issue in light of this Court's decision in *Farrar v. Hobby*, 506 U.S. ___, 121 L. Ed. 2d 494 (1992) ("*Farrar*"). Opp. Br., pp. 5-7.

As we will demonstrate below, these arguments are meritless.

ARGUMENT

I. THE *FARRAR* DECISION COUNTENANCES AN AWARD OF ATTORNEY'S FEES IN CASES WHERE AN INDIVIDUAL RECEIVES NOMINAL DAMAGES BUT SOCIETY AS A WHOLE BENEFITS

In her concurring opinion in *Farrar*, Justice O'Connor stated that attorney's fees should be awarded to a civil rights plaintiff who receives a nominal damages award where a significant "public purpose" is served. *Farrar*, 121 L. Ed. 2d at 510. There is no mention anywhere in that opinion of the additional requirement which the City seeks to impose, i.e., that the principal beneficiary of

plaintiff's victory must be plaintiff himself. Indeed, that requirement would completely negate one of the primary goals of Section 1988 – to secure "important societal benefits that are not reflected in nominal or relatively small damages awards." *City of Riverside v. Rivera*, 477 U.S. 561, 574 (1986) ("*Rivera*"). In *Rivera*, this Court highlighted the fact that the principal beneficiary of a successful civil rights claim is often the public rather than the individual plaintiff:

> "the public as a whole has an interest in the vindication of the rights conferred by the statutes enumerated in §1988, over and above the value of a civil rights remedy to a particular plaintiff . . . "

Rivera, 477 U.S. at 574, quoting *Hensley v. Eckerhart*, 461 U.S. 424, 444, n.4 (1983) (Brennan, J., concurring in part and dissenting in part).

The law does impose a requirement that a civil rights plaintiff must receive something of direct benefit to him to be a prevailing party eligible for an attorney's fees award under 42 U.S.C. §1988. *Farrar*, 121 L. Ed. 2d at 503. But, this Court in *Farrar* flatly decided that "a plaintiff who wins nominal damages is a prevailing party under §1988." 121 L. Ed. 2d at 504. In reaching its decision, the Court specifically distinguished nominal damages cases from the *Rhodes v. Stewart* and *Hewitt v. Helms* cases cited by the City in its Opposition Brief (Opp. Br., pp. 4-5). The Court noted that plaintiff's victories in those cases were truly hypothetical because they received nothing (not even $1) of value to them from their litigation efforts.

Thus, the City's citation of this Court's decisions in *Rhodes* and *Hewitt* is completely inapposite to the issue presented here. Unlike the plaintiffs in *Rhodes* and *Hewitt*, Cross-Petitioner is a prevailing party. Under the dictates of *Farrar*, a prevailing party who receives nominal damages can recover attorney's fees in cases with important societal consequences. This case, by the City's admission, has important societal consequences. It is also, by the City's admission, the "catalyst" which precludes the City from reinstituting a policy which permits the detention of arrestees while the police continue to investigate their possible complicity in other crimes. Opp. Br., p. 4. The fact that society benefits more than Cross-Petitioner from the decision is no reason to deny Cross-Petitioner an award of attorney's fees. Rather, an award of such fees in this case would ensure "vindication of important rights even when large sums of money are not at stake, by making attorney's fees available under a private attorney general theory." 121 L. Ed. 2d at 510 (O'Connor, J., concurring).

II. THE *FARRAR* DECISION'S DISALLOWANCE OF ATTORNEY'S FEES TO PLAINTIFFS WHO RECOVERED NOMINAL DAMAGES WAS NOT MEANT TO APPLY TO SITUATIONS INVOLVING COURT-APPOINTED COUNSEL

Even assuming, *arguendo*, that the admitted importance of this case does not countenance an award of attorney's fees under *Farrar*, considerations of fundamental fairness require an examination of whether *Farrar* was really meant to apply to cases involving court-appointed counsel. In *Farrar*, plaintiffs' private attorneys chose to

spend years litigating a case involving nominal damages and no long-range policy impact. This Court refused to compensate them for their efforts because these efforts did not "accomplish[ ] some public good other than occupying the time and energy of counsel, court and client." 121 L. Ed. 2d at 510 (O'Connor, J., concurring).

There can be no question but that lawyers should not be compensated for choosing to waste judicial resources. But, Willis' counsel did not make such a choice. Rather, as the district court's opinion awarding attorney's fees makes abundantly clear, it was the City's "intransigence" which guided the course of this litigation. Cross-Petition for Certiorari ("CR. Pet."), 26a-28a. *Farrar* was certainly never meant to allow defendant to stubbornly and unnecessarily continue litigation to the detriment of counsel who cannot choose whether to run or to stay and fight.

In its Opposition Brief, the City asserts that Cross-Petitioner seeks to convert the ethical obligation of counsel to accept appointment into a means of generating income. Opp. Br., p. 6. This is flatly untrue. From the beginning, counsel in this case litigated those issues on which Cross-Petitioner did not prevail with the same fervor it litigated the issue on which Cross-Petitioner did prevail. *See, Willis v. Bell*, 687 F. Supp. 380, 387, n. 8 (N.D. Ill. 1988). And, consistent with its obligations under *Hensley v. Eckerhart*, 461 U.S. 424 (1983), counsel eliminated all time spent on the issues Cross-Petitioner lost, and did not seek compensation for that time. Indeed, the District Court noted that the fee petition's reduction of hours for non-successful issues "if anything, understated the time actually chargeable in the areas as to which

[Cross-Petitioner] was the 'prevailing party for section 1988 purposes . . . '." Cr. Pet., 17a.

Appointed counsel should not be allowed to use appointment cases to waste the time of the court in an effort to generate fees. But, here, where that plainly did not occur, *Farrar*'s efforts to preclude lawyers from choosing to pervert the system for their own gain should not be applied so as to penalize appointed counsel where counsel represented the prevailing party.

CONCLUSION

For these reasons and those set forth in his Cross-Petition for a Writ of Certiorari, Cross-Petitioner Maceo G. Willis, Jr. respectfully prays that the Cross-Petition for a Writ of Certiorari be granted.

Respectfully submitted,

MACEO G. WILLIS, JR.

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